

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MERLIN SMITH,	§	
	§	No. 146, 2011
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0808022539
Appellee.	§	

Submitted: June 6, 2011
Decided: August 31, 2011

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

O R D E R

This 31st day of August 2011, upon consideration of the appellant's opening brief and the appellee's motion to affirm, it appears to the Court that:

(1) On December 22, 2008 in the Superior Court, the appellant, Merlin Smith, pled guilty to and was sentenced for Assault in the Second Degree, Criminal Mischief and Endangering the Welfare of a Child. For assault, Smith was sentenced to eight years at Level V, with thirty-two days of credit, suspended for four years at Level III. For criminal mischief and endangering the welfare of a child, Smith was sentenced to a total of two

years at Level V (one year for each) suspended for probation. On February 13, 2009, the Superior Court adjudged Smith guilty of violation of probation (VOP) and reimposed the December 22, 2008 sentence with fifty days credit.

(2) On May 1, 2009, the Superior Court again adjudged Smith guilty of VOP and resentenced him. For criminal mischief, the Superior Court imposed one year at Level V, with nineteen days credit, suspended for seven months at Level IV VOP Center. For assault, the Superior Court imposed eight years at Level V, with fifty days credit, suspended for four years at Level III. For endangering the welfare of a child, the Superior Court adjudged Smith guilty of VOP but discharged the probation as unimproved.

(3) On March 4, 2010, Smith was adjudged guilty of VOP for assault only and was resentenced to eight years at Level V, with credit for sixty-one days, suspended for fifteen days at Level IV VOP Center followed by four years at Level III. Finally, on February 25, 2011, the Superior Court adjudged Smith guilty of his fourth VOP – again for assault only – and sentenced him to eight years at Level V, with 136 days credit, suspended for 100 hundred days at Level IV followed by four years at Level III. This appeal followed.

(4) In this appeal from the February 25, 2011 VOP and sentence, Smith appears to claim that the Superior Court sentenced him, in error, for criminal mischief and endangering the welfare of a child. Smith also objects to the Superior Court's denial of his request, during the VOP hearing, to simply sentence him to jail with no probation to follow. Smith's claims are without merit.

(5) The record does not support Smith's claim that on February 25, 2011, the Superior Court adjudged him guilty of and/or sentenced him for VOP for either criminal mischief or endangering the welfare of a child. Rather, the record reflects that the Superior Court found Smith guilty of and sentenced him for VOP for assault in the second degree, the one conviction for which he was still serving probation. It further appears that the sentence imposed, *i.e.*, eight years at Level V suspended for 100 hundred days at Level IV followed by four years at Level III, was within statutory limits and did not exceed that which was originally imposed on December 22, 2008.¹

(6) To the extent Smith complains that the Superior Court did not grant his request to simply sentence him to jail with no probation to follow,

¹ See Del. Code Ann. tit. 11, §§ 612 (a)(1), 4205(b)(4) (2007) (providing that second degree assault, a class D felony, carries a sentence of up to eight years at Level V).

Smith's claim is unavailing. If a VOP is established, the Superior Court has the discretion to continue or revoke probation.²

NOW, THEREFORE, IT IS HEREBY ORDERED that the motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

² Del. Code Ann. tit. 11, § 4334(c); *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999).